STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. **Case No. 13-CF-1074**

CHONG LENG LEE,

Defendant.

DECISION

BEFORE: **HONORABLE GREGORY B. GILL, JR.**
Circuit Court Judge, Branch IV
Outagamie County Justice Center
Appleton, WI 54911

DATE: **August 27, 2018**

APPEARANCES: **MELINDA TEMPELIS**
District Attorney
Appearing on behalf of the State

ANA BABCOCK
Attorney at Law
Appearing on behalf of the Defendant

CHONG LENG LEE
Defendant
Appearing in person

Joan Biese
Official Reporter, Branch IV
Outagamie County --

Exhibit 30

TRANSCRIPT OF PROCEEDINGS

THE COURT: Do we have Attorney Babcock by way of telephone?

ATTORNEY BABCOCK: Yes, Judge, I'm here.

THE COURT: All right. Very good. So we are on the record in 13CF1074, *State of Wisconsin v. Chong Lee*.

And we have, appearing by way of video, Mr. Chong Lee. Mr. Lee, can you hear all right? Can you hear me, sir?

THE DEFENDANT: Yeah, I can.

THE COURT: Okay. Very good. And you can see me all right?

THE DEFENDANT: Yes, I can.

THE COURT: All right. Now, I may be looking off to the sides and things, and that's because when I see our video presentation, I'm looking at my monitor. So I'm not trying to be disrespectful or not pay attention to looking at you. In fact, I am looking at you, it's just strange because of the way my monitors are set up. Okay?

THE DEFENDANT: Okay.

THE COURT: All right. Now, I also have with us representing the State of Wisconsin Outagamie County District Attorney Melinda Tempelis.

And, Miss Tempelis, before we begin, has the victim rights statute been complied with?

ATTORNEY TEMPELIS: Yes.

THE COURT: All right. I do want to, before we begin, express my appreciation for everyone being able to reschedule. I apologize. It was not anticipated that I'd be unavailable this morning, so I -- I appreciate the indulgence on that. And I appreciate, likewise, the ability to get this scheduled for this -- this afternoon.

Now, with that, before the court is Mr. Lee's motion for post-conviction relief. In support of the motion, defense makes primarily two arguments: No. 1, that Mr. Lee received ineffective assistance of counsel, and that, two, Mr. Lee has been denied the right to a meaningful appeal due to an absence of transcripts.

Now, before addressing each motion on the merits, it is useful to look at this case from a historical basis. The instant matter was filed on or around December 16th of 2013. At the time, there were two separate causes of action that had been alleged, namely, first-degree intentional homicide with the use of a dangerous weapon and possession of a firearm by a felon. Approximately three months

later, the information was filed. The information contained the original charges as well as four counts of felony intimidation of a witness as a party to the crime and a single count of solicitation of perjury before a judge.

The trial was ultimately held in February and March of 2016 and lasted eleven days. The trial included testimony from 40 plus individuals, and ultimately, the jury convicted Mr. Lee of first-degree intentional homicide with the use of a dangerous weapon and felon in possession of a firearm, as well as two counts of felony intimidation of a witness as a party to the crime.

It is also significant to note that prior to the trial there was extensive motion practice. Over the duration of the action, there appeared to have been no fewer than 13 motions related to evidentiary issues filed by the defense, the final motion to suppress being filed during the trial itself.

It is against this backdrop that the court now examines the motion before it.

First of all is the motion related to the ineffective assistance of counsel.

Now, to establish ineffective assistance of counsel, a defendant must establish both that his or

her trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 US 668, a 1984 case. Now, pursuant to *Strickland*, the defendant bears the burden of affirmatively proving prejudice. *State v. Roberson*, 292 Wis.2d 280. That's a 2006 case. In considering whether or not the defendant has met this burden, the court should consider the totality of the evidence before the trier of fact. *State v. Johnson*, 153 Wis.2d 121, 1990. To show deficient performance, the defendant must show that his counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. *State v. Jenkins*, 355 Wis.2d 180, a 2014 case. A court reviewing counsel's performance must be highly deferential, and trial counsel enjoys a strong presumption that his or her conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 US at 689. Now, a court must make every effort to reconstruct the circumstances of counsel's challenged conduct, to evaluate the conduct from counsel's perspective at the time, and to eliminate the distorting effects of hindsight. *Jenkins*, 355 Wis.2d, 180. Now, counsel's performance

need not be perfect, nor even good, to be constitutionally adequate. That comes from the *Carter* case, 324 Wis.2d 640, citing *State v. Thiel*, 264 Wis.2d 571, a 2003 case. Thus, the defendant must overcome the presumption that the alleged deficient conduct might be considered sound trial strategy. Again, the *Strickland* case provides support for that.

Here, appellate counsel argues that trial counsel was ineffective for failing to object to witness Brittany Olson's statement, your boyfriend shot my boyfriend. To be clear, and as noted by appellate counsel, defense counsel did object to the statement on grounds of hearsay. The objection was overruled, and thereafter, defense counsel made a strategic decision to not renew the objection on hearsay grounds when subsequent opportunities to do so occurred. Regardless, appellate counsel asserts that additional objections based upon the statement being irrelevant and unduly prejudicial should have been made.

To counsel's first argument that the statement should have been objected to and sustained based upon relevancy, we look at relevant evidence. Relevant evidence means any evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Wisconsin Statutes 904.01. Here, appellate counsel argues that the admitted statement was not relevant as Miss Olson clearly did not see who shot the victim, suggesting that the statement, if made, was false. Now, counsel makes no reference to the record to support this contention, and unfortunately for counsel, the record is not as unequivocal as the court would be led to believe.

The transcript exchange reads as follows:

Question: When the people or the group approached you, I think is what you said, do you remember anything that occurred then?

Answer: There was an altercation with the guys were pushing him, and I remember trying to get in between to break them up, and the next thing I remember was that he was laying on the ground.

Question: Do you remember any -- hearing anything prior to that?

Answer: Just arguing, but I don't know what it was about.

Question: Do you remember seeing these people at all earlier in the night?

Answer: I don't remember.

Question: When you saw Josh on the ground, how did you feel?

Answer: I can't even describe it.

Question: Shocked?

Answer: Shocked. Yeah. Scared. Angry.

Question: Do you remember what you did then?

Answer: I started yelling for people to call 911.

Question: Do you remember, Miss Olson, the people that had been around Josh, what if anything they did after he was then on the ground?

Answer: After he was on the ground, then the people started leaving, and I remember that I ran after -- outside I ran after the girl that was with them.

Question: Do you remember why you ran after her?

Answer: Because she was with them who did this. And I don't know what I was thinking.

Question: At that point were you still shocked and angry?

Answer: Yes.

Question: Do you remember what if anything you did then?

Answer: I remember running after her and taking her on the sidewalk and yelling at her saying that I know she knows who they are and that -- where they went and trying to find out where they are.

That comes from the trial transcript, Day Two, Pages 132 to 134.

Now, upon cross-examination the following exchange took place.

As far as that night, you have some memory lapses from just the fact that you had been drinking all night.

Answer: That and probably shock.

That comes from the trial transcript, Day Two, Page 137.

Now, having reviewed the transcript and the definition of relevancy, the court agrees with the State that the statement is one of credibility, not relevancy.

That said, appellate counsel also asserts that counsel was deficient for failing to offer that the proffered material was unduly prejudicial. Again, the contention cannot be sustained. Unfair prejudice can result when the proffered evidence appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes

a jury to base its decision on something other than the established propositions in the case. *State v. Hurley*, 361 Wis.2d 529. That's a 2015 case.

Here, we are dealing with a homicide trial. The subject of death was known from the outset of the trial. To that same degree, it was known that Mr. Lee was the accused. The statements attributable to Miss Olson were not overly highlighted and came in and amongst testimony, as noted by appellate counsel, describing Mr. Lee's confessions. A review of the record would hardly suggest that a statement made by a woman under duress and while intoxicated, as noted by defense counsel, was so prejudicial to reach the threshold of being unduly prejudicial.

It should also be noted that part of what makes the analysis more difficult in this instance is that appellate counsel did not inquire of either defense counsel why they did not object on grounds of relevancy or undue prejudice. Now, this is particularly true where, as previously noted, a court reviewing counsel's performance must be highly deferential, and trial counsel enjoys a strong presumption that his or her conduct falls within the range of reasonable professional assistance. The *Strickland* case. A court must make every reasonable

effort to reconstruct the circumstances of counsel's challenged conduct, to evaluate the conduct from counsel's perspective at the time, and to eliminate the distorting effects of hindsight. *Jenkins* case, 355 Wis.2d 180. That is citing *State v. Carter*, 324 Wis.2d 640, a 2010 case, noting that counsel's performance need not be perfect, or even good, to be constitutionally adequate.

Now, from the motion practice and the trial itself, the court may not have been aware that Attorney Vishny was the most experienced lawyer in the state in terms of homicide cases within the State Public Defender's office. That came out during the post-conviction motion on day one at Page 11. It was evident that highly -- that Attorney Vishny was highly competent. To that same end, Attorney Weitz showed a strong grasp of legal concepts and evidentiary principles.

In light of the credentials proffered, the facts surrounding the statements, and the failure of defendant to show that defense counsel's strategy was unsound, the court finds that the defense has not met its initial burden. However, even if the court had concluded otherwise and found the conduct of Attorneys Vishny and Weitz to be deficient, it still

would not warrant the requested relief, for, if a finding of deficiency is made, defense must still show that the deficient performance prejudiced the defendant, which requires a showing that counsel's performance was so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland* at 687. The defendant must show that there is a reasonable probability the result would be different absent counsel's deficient performance. Again, the *Strickland* case.

A reasonable probability is a probability which undermines confidence in the outcome. *Strickland* case. A defendant fails to establish prejudice if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. That comes from the *Jenkins* case, 355 Wis.2d 180.

Now, while courts should consider the cumulative effect of the alleged deficiencies, a defendant cannot merely present a laundry list of mistakes by counsel and expect to be awarded a new trial. *State v. Thiel*, 264 Wis.2d 571. That's a 2003 case. In most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if

the evidence against the defendant remains compelling. Each error alleged must in itself fall below an objective standard of reasonableness to be included in the cumulative error prejudice calculus.

Now, here, the totality of the evidence supports Lee's conviction. Even if Olson's testimony had not been considered, the evidence against Lee remains compelling.

Number one: Witness Via Thao testified that after the shooting, Chong Lee admitted to him that there was a fight in Appleton and he pulled out a gun and shot a guy. Trial Date 3 at Page 34.

Witness Peter Moua testified that after the shooting, Chong Lee asked him if he heard about the Luna shooting, admitted there was a fight, and then said, I got him. Trial Day 3 at Page 60.

Witness Kong Vang testified that after the shooting, Chong Lee admitted to him that he shot somebody to protect his brother. Trial Day 3 at 71.

Witness Phong Lee testified that while at Luna, Paul Lee, Chong's brother, was fighting with a bigger guy. Trial Day 3 at 134.

Witness Phong Lee, after being impeached, admitted that he told the police that Chong Lee stated to him that he popped a guy. Trial Day 3 at

176.

Witness Paul Lee, after being impeached, was confronted with the fact that he told law enforcement officers that after the shooting, Chong stated that he, quotes, fucked up, end quotes, shot the guy. Trial Day 4 at 173.

Paur also -- Paul also was impeached with the fact that he told officers that he did not know Chong had a gun and that he was upset about what Chong had done. Trial Day 4 at 182.

Paul is further impeached with the fact that he had told Chong had ditched the gun -- Paul was further impeached with the fact that he told officers that Chong ditched the gun after the shooting. Trial Day 4 at 186.

Paul was present -- presented with a letter he wrote which stated in parts, quotes, when it got - State of Wisconsin v. Chong Lee, 6/18/2018 10 -physical, Chong came from Josh's left side and point blanked Josh. I'm sorry, the -- take that out. I was reading the caption as well. When it got physical, Chong came from Josh's left side and point blanked Josh. That was Trial Day 4 at 192.

Witness Melanie Thao, after being impeached, was confronted with the fact that she told law

enforcement officers that Chong admitted to being the shooter when she was eating diner with him at (sic) the shooting. Trial Day 5 at 140.

Melanie was also confronted with the fact that Chong told her that it appeared that the victim was going to fight his brother, Paul, so Chong did what he did. Trial Day 5 at 141.

Witness Stephanie Thao testified that while eating dinner with Chong after the shooting, Chong said he was the one who did it. Trial Day 5 at 197. Stephanie Thao elaborated, indicating, I just remember a little bit that he said that the other guy was going to swing at his brother, and that's when he got mad, and that's all I could remember. Trial Day 5 at 197.

Stephanie Thao also testified, again, that Chong admitted to shooting the victim in the head. Trial Day 5 at 198.

Witness Joe Thor testified that after the shooting, Chong admitted to him that he did the shooting at Luna Lounge. Trial Day 7 at 25.

Now, also, as it relates to the beat the case issue, or turning to the beat the case issue, the court notes in an October 2015 order that the court fails to see how the statements made to individuals

other than the victims on the intimidation charge, or with the instructions related to the victims, are relevant. Similarly, the statements in and of themselves appear to be subject to various meanings. Given the context, it is equally possible or plausible that the comments are innocent or nefarious. For this reason too, the comments are excludable. The court also noted that although relevant evidence may be excluded if it's probative value is substantially outweighed by danger of unfair prejudice, confusion, or misleading the jury, or by considerations of undue delay, wasting of time or needless presentation of cumulative evidence. Wis. Stats 904.03. This case standing alone is complex with many moving parts and witnesses, and it is the opinion of the court that these statements, if allowed, would only add to confusion to the matters at hand. That was the order.

Now, despite the ruling, at trial the jury was permitted to review a correspondence which contained the exact phrase for which there had been concern. Regretfully, the basis for allowing the statement, either by consent or by a subsequent decision, is uncertain and, as such, the court will assume for present purposes that the conduct of counsel was

deficient.

Now, assuming that the first prong has been met, the claim must still fail on the second prong. First, as noted in the court's earlier decision, or earlier portion of the decision, the statements at issue were intended for consideration on charges that resulted in acquittals for Mr. Lee. Second, the court would note that the statement was read into the record once and was sent back to the jury as part of a requested exhibit. Now, while appellate counsel attempts to speculate that the statement made played a role in the decision of the jury, the court disagrees. The court fails to see, again assuming deficient performance, how Mr. Lee was prejudiced on charges that the defendant was convicted upon, particularly given the evidence against Mr. Lee as noted previously in today's decision. Furthermore, the court would note that the statement was -- the statement that was referenced was referenced only a de minimis amount of time in trial, and that was a trial that consisted of 40 plus witnesses over the course of eleven days. I would again highlight the *Strickland* case which indicates that if a finding of deficiency is made, the defendant must still show the deficient performance prejudiced the defense, which

requires a showing that counsel's performance was so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Thus, based upon the court's reasoning, the court concludes that this claim related to beat the case must fail.

Turning to the second substantive category, and that is the absence of transcripts, the court notes that it is argued that because certain discussions took place between the court and parties off the record, a retrial is warranted. In support of this proposition, appellate counsel cites to the case of *State v. Perry*, 136 Wis.2d 92, a 1987 case, and also points to Supreme Court Rule 71.01. Now, with respect to the latter, the court finds this somewhat to be a red herring as the contents of the in-chambers meeting are unknown such as to determine whether or not 71.01 is implicated. More importantly, however, to the extent that 71.01 would be implicated, 71.01 does not stand for the proposition that meetings that do not conform to the Supreme Court rule result in an automatic entitlement to a retrial.

Now, regardless, what is known is that certain discussions lack transcripts, and therefore, *State v.*

DeLeon, 127 Wis.2d 74, a 1985 case, as revisited in *State v. Perry*, 136 Wis.2d 92, a 1987 case, governs the court's analysis on this issue.

Now, in *Perry* the court, or the Supreme Court, found that retrial was warranted based upon extensive missing transcripts. In particular, partial testimony from five witnesses were missing, as well as the entire testimony from two others, only fragmentary portions of the argument on motions, discussion on stipulations, the in-chambers conference on exhibits, an offer of proof from a defense witness, the prosecutor's closing argument and the instructions to the jury. In addition, the notes yielded several unidentified and random portions of the proceeding that could not be pieced together. That's all found in the *State v. Perry* case.

Now, notwithstanding the fact that a retrial was appropriate in *Perry*, *Perry* notes that not all deficiencies in the record nor all inaccuracies require a new trial. An inconsequential omission or a slight inaccuracy in the record which would not materially affect appellate counsel's preparation of the appeal or which would not contribute to an appellate court's improper determination of an appeal

do not rise to such magnitude as to require ipso facto reversal. Error in transcript preparation or production, like error in trial procedures, is subject to the harmless error rule. And again, *State v. Perry*.

To determine if a retrial is necessary, there is a multipart examination that must take place. The first step is to show a colorable need for the missing transcript, noting that a defendant does not need to demonstrate or assume the burden of showing that the alleged -- error alleged is prejudicial. Yet, however, it must be clear that the error cannot be of such a trivial nature that it is clearly harmless. The error must be of potential substance and, depending upon the state of the record that can be produced, arguably prejudicial. These considerations should be articulated by the court in the individual case. The claims should be more than frivolous, and a lacunae of the records should be of such substance as to lend credence to the claim that error was prejudicial had the missing segment been produced. *State v. Perry*.

Now, in support of the argument that there is a colorable claim, the defendant points to the statement of beat this case. With respect to this

issue, the court concedes, as it must, that there is no transcript available of in-chambers discussions where there may or may not have been conversations which led to the admission of materials previously determined to be inadmissible. What is known, however, is that such statements were presented to the jury. In fact, the exact nature of all of the presentation of that testimony is known. For all testimonial portions of the proceedings, there is a complete record. This is unlike *Perry* where there was significant portions of testimonial portions of the trial that was missing. Again, in this case, there was no missing testimonial evidence.

Now, in light of the court's prior discussion related to the statement at issue, i.e. beat this case, the conclusion -- the court concludes that the why question to the allowance of the statement is not one of the type of question that would lead to a showing of prejudice. To summarize, the court concludes that, number one, Mr. Lee was acquitted of the charges to which the statement pertained, and, two, to the extent it was considered in conjunction with the homicide trial, the evidence outside of the statement was sufficient such as to render its inclusion meaningless.

With respect to non-specified claims demonstrating the colorable need, the court is equally unpersuaded. The record is replete with motions where decisions were made, as well as the complete testimonial record. While the basis for certain decisions may not be known, what is known is what evidence went to the jury. Other than the beat the case statement, the defendant has not shown a single statement that demonstrates a colorable need. The court is not going to speculate that there is a colorable need for the rationale related to certain testimony that may and/or may not have been germane to any decisions. Thus, the court finds that the arguments related to any unidentified statements are equally unpersuasive as a basis for retrial.

As such, it shall be the order of the court that counsel's post-conviction motion for relief be denied.

Any questions, Miss Tempelis?

ATTORNEY TEMPELIS: Nothing from the State. Thank you.

THE COURT: Miss Babcock, any questions?

ATTORNEY BABCOCK: No, Judge. I would just note that I will electronically file a proposed order consistent with the court's ruling this afternoon.

And I'm not sure if Mr. Lee can hear me or not, but if he could just be made aware that I will schedule a phone conference with him in short order to address our next steps.

THE COURT: Okay. Mr. Lee, are you able to hear that, sir?

THE DEFENDANT: Yeah. That's fine.

THE COURT: Okay. And then, Attorney Babcock, what I will do is I will take care of signing that order. And, Miss Tempelis, do you want to see that beforehand?

ATTORNEY TEMPELIS: She can send it to me along with the court if she would like, that would be fine.

THE COURT: You're okay with that? And then what I would probably do is, as long as I don't hear an objection by end of business tomorrow, I'll sign it tomorrow.

ATTORNEY TEMPELIS: Sure.

THE COURT: Okay. You're okay with that, Attorney Babcock?

ATTORNEY BABCOCK: Yes. Thank you, Judge.

THE COURT: All right. Thank you all. We are adjourned.

(Proceedings concluded.)

C E R T I F I C A T E

STATE OF WISCONSIN)
) ss.:
COUNTY OF OUTAGAMIE)

I, JOAN BIESE, RMR/CRR, do hereby certify that I am the official court reporter for Branch IV of the Circuit Court of Outagamie County;

That as such court reporter, I made full and correct stenographic notes of the foregoing proceedings;

That the same was later reduced to typewritten form;

And that the foregoing proceedings is a full and correct transcript of my stenographic notes so taken.

Dated this 6th day of September, 2018.

Electronically signed by
Joan Biese, RPR/RMR/CRR